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No. 89-1910

# In The Supreme Court of the United States

**October Term, 1990**

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,
*Petitioner,*

v.

AMERICAN HOME PRODUCTS CORPORATION,
*Respondent.*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO**

## REPLY BRIEF OF THE PETITIONER

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## ARGUMENT IN SUPPORT OF ALLOWING WRIT OF CERTIORARI

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### INCOME FROM THE SHORT-TERM INVESTMENT OF ACCUMULATED EARNINGS, WHICH A CORPORATION HOLDS AS A RESERVOIR OF CAPITAL FOR USE IN ITS BUSINESS OPERATION, CONSTITUTES UNITARY INCOME, THE APPORTIONMENT OF WHICH IS NOT PROHIBITED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In its brief in opposition to the Petition for Certiorari, the American Home Products Corporation (hereinafter referred to as AHP) makes several arguments, all of which are directed to its contention that this is simply an appeal from the application of a clear and well-settled principle to a specific fact pattern. AHP argues that such a case does not merit a review by this Court. AHP is wrong. The Ohio Supreme Court has not simply applied a settled principle in a

questionable manner. It has distorted the principles and standards in the cited cases to the point that it has implemented a new test for determining whether a company's short-term investment of its operating surplus may be viewed as part of its unitary business operations. In defending such action, AHP has further confused the issue by its description of the investments in question.

First, AHP's brief is misleading in its repeated characterization of the income in issue as the income from an investment fund. AHP describes this as a fund held "solely for investment rather than for working capital" and asserts a "factual finding" by the Ohio Supreme Court that such "investment portion" of AHP's funds were not used as a source of working capital.

In this regard, both the Ohio Supreme Court and AHP have distorted the concept of working capital which this Court employed in *ASARCO, Inc. v. Idaho State Tax Commission,* 458 U.S. 307 (1982), and which other state courts have recognized in the decisions cited in the petitioner's initial brief. Specifically, in *ASARCO, supra,* at 324 n. 21, the Court expressly considered the need of a company to rely on its intangible investments as a source of operating capital. The Court noted that ASARCO, Inc. had sufficient cash flow from mining to provide operating capital for all mining operations without reliance upon cash flow from income from intangibles. Similarly, in *Sperry & Hutchinson Co. v. Department of Revenue,* 270 Or. 329 (1974), 527 P.2d 730, the Supreme Court of Oregon excluded from working capital those investments which had been identified as a specific portion of a company's investment portfolio and which were earmarked for uses other than the company's normal business operations. However, the Oregon court held that the portion of the company's investment portfolio which was not so earmarked and which was "held to satisfy" the need for liquid capital in normal business operations was part of such company's unitary business.

Common to such decisions has been the determination of the company itself as to whether to keep such investments

available for use in its normal business operations. As the Supreme Court of New Jersey observed in *Silent Hoist & Crane Co., Inc. v. Director, Division of Taxation,* 100 N.J. 1 (1985), 494 A.2d 775, the "focus must be on Silent Hoist's investment activity and other aspects of its corporate business and the role the investment activity plays in those other activities." *Id.*, at 19.

In the instant case, however, the Ohio Supreme Court did not apply such a test. Unlike the court in *Sperry & Hutchinson Co.,* it did not inquire as to whether a specific portion of AHP's investment portfolio had been segregated and earmarked for purposes other than normal business operations. Unlike this Court's decision in *ASARCO,* the Ohio Supreme Court's decision in the instant case is not based on any determination that the company had not relied on income from its investments as a source of operating capital. On the contrary, the Ohio Supreme Court's decision acknowledged that AHP had spent some of these funds for operations and had, thus, used the investments as a source of operating or working capital.

The Ohio Supreme Court's decision applied a far narrower test than the "held to satisfy" test in *Sperry & Hutchinson Co.* or this Court's inquiry in *ASARCO* as to whether normal business operations could be conducted without reliance on cash from intangible investments. While acknowledging that nexus to Ohio existed as a result of AHP's reliance on its short-term investment of surpluses as a source of funds for operations, the Ohio Supreme Court concluded that nexus was then somehow broken to the extent that AHP did not actually use the funds in its operations. In doing so, the Ohio Supreme Court limited the concept of working capital or operating capital to that amount actually used in operations, irrespective of the amount the company chose to hold available to satisfy its constantly changing needs.

There is absolutely no basis in *ASARCO* or any of the other cited cases for the Ohio Supreme Court's ***post facto*** approach to measuring AHP's investment of working capital and its nexus to the states in which AHP operated. The Ohio

Supreme Court's use of hindsight in concluding that these investments became a discrete business enterprise to the extent that they were not actually used in operations during a particular accounting period was illogical and contrary to this Court's approach to the concept of a unitary business in *ASARCO*, as well as in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983), reh. den. 464 U.S. 909 (1983), and *Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980). Indeed, under the Ohio Supreme Court's approach, an interest-bearing checking account used by a company to pay its bills would be viewed as a discrete business enterprise to the extent that the company maintains a balance in the account.

This is not, as AHP suggests, a little case involving a dispute as to the application of established legal principles and standards to a particular set of facts. The Ohio Supreme Court has so distorted the principles and standards employed in the cited cases that it has effectively implemented a new test for determining whether a company's short-term investment of its operating surplus is to be viewed as part of its unitary business operations. The Supreme Court of Ohio has applied a different and far more restrictive standard under *ASARCO* than is applied in other states. If not reversed by this Court, the decision of the Ohio Supreme Court will have a broad and devastating impact on the ability of Ohio to constitutionally apportion and tax the unitary business income of a company operating inside and outside of Ohio. This case is, therefore, one of great importance. Accordingly, this Court should grant this Petition and reaffirm the right of Ohio to apportion and tax such income.

## CONCLUSION

For the reasons discussed above and in the Petitioner's initial brief, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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JOANNE LIMBACH,
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Reply Brief Of The Petitioner has been served on the respondent by forwarding such copies to Roger F. Day, of Jones, Day, Reavis & Pogue, 1900 Huntington Center, 41 South High Street, Columbus, Ohio 43215, counsel for respondent, by United States mail, first-class postage prepaid, this _____ day of August, 1990. I further certify that all parties required to be served have been served.

JAMES C. SAUER
Assistant Attorney General
Counsel of Record